ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

NO C11; C12; C13; C14; C15; C17; C18 OF 2017

RE SENATOR THE HON MATTHEW CANAVAN
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

RE MR SCOTT LUDLAM
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

RE MS LARISSA WATERS
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

RE SENATOR MALCOLM ROBERTS
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

RE THE HON BARNABY JOYCE MP
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

RE SENATOR THE HON FIONA NASH
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

RE SENATOR NICK XENOPHON
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

10 **SUBMISSIONS IN REPLY OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH**

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Date of this document: 6 October 2017

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PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ARGUMENT

2. ***Sykes v Cleary***: Mr Windsor's primary submission (at [8]) is that the *Joyce* reference can be decided by reference to *Sykes v Cleary* (***Sykes***).[1] That submission fails to grapple with the novel issue presented by that reference: whether a natural born Australian who unknowingly holds foreign citizenship by descent is disqualified by s 44(i). Neither *Sykes* nor *Sue v Hill*[2] raised that issue.[3] The fact that no distinction was drawn in those cases between natural born and naturalised citizens in the application of the test identified by the Court simply reflects that the Court was deciding the cases that were before it, which concerned only naturalised Australian citizens.

3. The Attorney-General does not seek to re-open *Sykes*.[4] Instead, he identifies: (1) the limits of what was decided in *Sykes*; and (2) a principled basis, consistent with the text, history and purpose of s 44(i), for the approach adopted by the majority in *Sykes* as a specific application of the Attorney-General's construction.[5] Even if the references were to be decided simply by applying the approach in *Sykes*, for the reasons given in paragraphs [76]–[79] of the Attorney-General's primary submissions, Mr Joyce, Senators Canavan, Nash and Xenophon, and Ms Waters would not be disqualified.

4. The contradictors (Mr Windsor, Ms Waters and Mr Ludlam, and the Amicus) emphasise that s 44(i) is concerned with the status of foreign citizenship.[6] But it was recognised in *Sykes* that the task of applying s 44(i) does not end with the identification of a person's status under foreign law, for *Sykes* established that no effect is given to foreign law if a person has taken all reasonable steps to renounce foreign citizenship. It necessarily follows that s 44(i) does not bear its literal meaning, and does not give unqualified effect to foreign law. Repeated references by the contradictors to the "text" or "plain meaning" of the provision are therefore unilluminating, and provide no explanation for the exceptions to the application of foreign law which the contradictors embrace.

5. Mr Windsor accepts (at [27]) the examples of exceptions to the application of foreign law identified by Brennan J in *Sykes* (although he wrongly treats those examples as exhaustive). Indeed, he ascribes Brennan J's reasoning to all of the members of the majority (at [9](c), [10], [12], [27], [31]–[32], [44]), notwithstanding the fact that the plurality and Dawson J expressed their reasoning very differently to Brennan J. However, there is no reason why the universe of exceptions should be identified in accordance with international law ("exorbitant" or otherwise). The purpose and history of s 44(i) provide a much surer guide to ascertaining its legal meaning, those being

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1 (1992) 176 CLR 77.

2 (1999) 199 CLR 462.

3 Cf also Amicus Submissions at [21]–[24].

4 Cf Windsor Submissions at [15], [17].

5 Attorney-General's principal submissions at [67]–[75].

6 Windsor Submissions at [11], [33], [36], [73]; Ludlam/Waters Submissions at [20], [38]–[40]; Amicus Submissions at [15]–[16].

familiar tools in determining the meaning of the Constitution. Consistently with that submission, the plurality in *Sykes* supported its conclusion that s 44(i) did not disqualify a naturalised Australian who had taken "all reasonable steps" to renounce foreign citizenship by reference to the purpose of s 44(i), and the nature of the society in which that provision was adopted, rather than by reference to international law.[7]

6. **Purposes of s 44(i):** The Amicus's submission (at [16]) that "[i]t should not be thought that the status of citizenship overreaches very far or at all beyond the class of persons who in fact owe allegiance" ignores the circumstances of the references now before the Court. None of the five referred persons whom the Attorney-General contends were not disqualified despite their foreign citizenship can fairly be said to have owed any loyalty to a foreign state. All of them were oblivious to their status under foreign law until very recently and all, having become aware of that status, immediately renounced it.

7. Some of the contradictors submit that a purpose of s 44(i) is "avoiding the risk or appearance of divided allegiances".[8] However, there is nothing in the text or historical record to indicate that s 44(i) is concerned with appearances. Further, in the context of foreign citizenship of which neither a person seeking election nor any other person is aware, any focus on the appearance of split allegiance is particularly inapt.

8. Some contradictors submit that a purpose of s 44(i) is certainty in the electoral process, and that this purpose supports their preferred construction.[9] It may be accepted that certainty is an important value in the electoral process, which informs the construction of s 44(i). But that is a long way from saying that the preservation of certainty is a purpose of the disqualification of a person who "is a subject or a citizen ... of a foreign power". Plainly it is not, for certainty as to the composition of the Parliament that is chosen by the people would be best promoted if there were no disqualification provisions. Section 44(i) seeks to ensure that parliamentarians do not have split allegiance, despite the fact that the pursuit of that purpose detracts to some degree from the public interest in the certainty of the composition of Parliament.

9. In any event, the construction of s 44(i) for which the contradictors contend would not produce certainty.[10] That is so for two reasons. *First*, the contradictors do not challenge *Sykes*, but that case establishes that the question whether a person has taken all reasonable steps to renounce foreign citizenship is an evaluative inquiry that turns on all the circumstances, including the subjective belief or knowledge of the person concerned.[11] Accordingly, the contradictors' submission that acceptance of their construction would produce "bright lines"[12] is not correct.

10. *Second*, if the contradictors' submissions that s 44(i) is concerned solely with status under foreign law were to be accepted (subject to unspecified, but limited, exceptions), that would make the composition of the Parliament turn on questions of foreign law that

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7 *Sykes* (1992) 176 CLR 77 at 107 (Mason CJ, Toohey and McHugh JJ).

8 Amicus Submissions at [17], [29]; Windsor Submissions at [45]–[46].

9 Amicus Submissions at [14], [18]–[20], [29]; Windsor Submissions [39], [42]–[43].

10 Cf Windsor Submissions at [43]; Ludlam/Waters Submissions at [8], [34], [49].

11 *Sykes* (1992) 176 CLR 77 at 108 (Mason CJ, Toohey and McHugh JJ), 131 (Dawson J).

12 Cf Windsor Submissions at [37]; Ludlam/Waters Submissions at [15].

would potentially need to be addressed at multiple different points in time, based on facts that may be difficult to ascertain even by a candidate him or herself, let alone by the public at large.[13] On that approach, the operation of s 44(i) may turn, for example, on the effect of a parent having left a foreign country before or after independence (*Xenophon*), or on whether one or more grandparents were naturalised before or after a Parliamentarian's parents were born (*Canavan*). It will require ascertaining whether foreign *jus sanguinis* laws confer citizenship by reference to either the father or mother and, if that has changed (which in many places it has), when that change occurred (including possibly by reference to rulings of foreign courts with retrospective effect) (*Canavan*). It may depend on ascertaining a parent or grandparent's movements or actions, in circumstances where family breakdown or death makes that information difficult or impossible to obtain (*Nash*), or where relevant events occur when a Parliamentarian was a child, with the result that the Parliamentarian had no knowledge of them (*Joyce*). Further, foreign law may change from Parliament to Parliament, potentially conferring foreign citizenship on a person after they are elected (making the composition of the Parliament subject to choices made in foreign legislatures or courts). It is wrong to suggest that the inquiries are "simple" or the answers "easy".[14] That is illustrated, in part, by evidence in the matters now before the Court of several occasions when enquiries of an Embassy produced incorrect answers.[15] And, in all of those cases, if any error is made either as to a relevant fact or foreign law, the consequence is automatic disqualification from the Parliament, even if the error had no bearing whatsoever on whether a Parliamentarian has split allegiance.

11. By contrast, on the application of the Attorney-General's construction, none of the above matters would be relevant in cases where a Parliamentarian can honestly swear to being unaware that he or she was, or that there was a considerable, serious or sizeable prospect that he or she was, a foreign citizen. In such a case, if there is material that contradicts such a claim, then the matter can be tested, as occurred in relation to Senator Roberts. Otherwise, the oath of the Parliamentarian should be accepted, and no question of disqualification would arise provided that reasonable steps were taken to renounce foreign citizenship within a reasonable time of the Parliamentarian becoming aware of his or her status. That process would not involve any particular difficulty, as proof and testing of knowledge is something that is regularly and readily done in courts, simply by reference to the evidence of the parties involved[16] (and without the need for the potentially complex and convoluted evidence of the kind referred to above, and without questions of qualification turning on facts that occurred decades ago that have no bearing on whether a natural born Australian citizen should be able to serve in Parliament).

12. **Other paragraphs of s 44:** The conclusion that s 44(i) is concerned with foreign

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[13] Cf Amicus Submissions at [33]–[36].

[14] Amicus Submissions at [33], [43]; Ludlam/ Waters Submissions at [8]

[15] *Re Joyce*, compare NZ High Commission advice at CB 1321 [19] with Goddard QC Opinion at CB 1341 [6]; *Re Xenophon*, compare initial advice of Greek Embassy at CB 701 with subsequent advice at CB 703 and 729.

[16] Cf Amicus Submissions at [36]–[38].

citizenship that is voluntarily acquired or retained says nothing as to the construction of the other paragraphs of s 44.[17] Each turns upon its own words and describes a distinct disability. To the extent that other paragraphs refer to a status, it does not follow that each must be voluntary. That requirement arises in the context of s 44(i) because the purpose of that provision, and its history, require only the disqualification of persons who voluntarily possess foreign citizenship. For the other paragraphs, the same contextual factors do not necessarily warrant confining the disqualification to persons who voluntarily have a particular status.

13. **Historical material:** The Attorney-General does not seek to imply the meaning of the words deleted from the constitutional drafts back into s 44(i).[18] Nor does he refer to the subjective intention of any of the framers or Colonial Office staff.[19] Rather, the Attorney-General points to the historical material to identify the purpose of s 44(i), the changes in language between the various drafts, and the provisions on which s 44(i) was modelled, those matters being important parts of the context in which s 44(i) must be interpreted. The relevance of this material is illustrated by *Re Day (No 2)*.[20]

14. The historical material on which the Attorney-General relies demonstrates that the literal construction for which the contradictors contend would have produced an outcome radically at odds with widespread practice at the time of Federation. That makes it most unlikely that the literal construction is correct, particularly as the Convention Debates suggest that the purpose of s 44(i) was the same as that of its colonial predecessors and that the change in language between drafts was directed to a quite different object from that which the contradictors suggest.[21] Although the Attorney-General's construction also departs from the historical antecedents, it is a less radical departure than that proposed by the contradictors, and retains the critical role of voluntariness in evidencing the split allegiance to which s 44(i) is directed.

15. **Knowledge:** The Amicus' reference (at [38]–[39]) to the *Baden* categories as being categories of "knowledge" is misleading.[22] Categories (iv) and (v) are constructive knowledge. This is a distinct concept from actual knowledge.[23] Further, although the Amicus submits that category (v) should suffice for the purpose of s 44(i),[24] he offers no convincing reason as to why that should be so. That does not involve knowledge of

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17 Cf Windsor Submissions at [37].

18 Amicus Submissions at [52].

19 Cf Windsor Submissions at [65]. Further contrary to the Ludlam/Waters Submissions at [10(c)], there is no difficulty referring to the Colonial Office memorandum: see *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548 at 576–577 [32] (French CJ). It is no less indicative of the purpose of the changes made in response by the drafting committee than the negotiations that took place in the United Kingdom concerning the form of s 74 of the Constitution: *A-G (Cth) v T & G Mutual Life Society Ltd* (1978) 144 CLR 161 at 186–193 (Aickin J).

20 (2017) 91 ALJR 518 at 524–525 [14]–[21], 526–527 [29]–[35], [39] (Kiefel CJ, Bell and Edelman JJ), 535 [98] (Gageler J), 543–545 [161]–[179] (Keane J), 554 [247], 557 [268]–[271] (Nettle and Gordon JJ). See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 188–194 [53]–[67] (Gummow, Kirby and Crennan JJ); *Singh v Commonwealth* (2004) 222 CLR 322 at 331–333 [10], [12] (Gleeson CJ), 385 [159] (Gummow, Hayne and Heydon JJ), 423–424 [293] (Callinan J).

21 See the Attorney-General's principal submissions at [37]–[49].

22 See also Ludlam/Waters Submissions at [47]–[50].

23 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 163 [174] (the Court).

24 As, in effect, do Mr Ludlam and Ms Waters: Ludlam/Waters Submissions at [6].

foreign citizenship at all: it involves a requirement to make reasonable inquiries in order to acquire information. That would not advance the purpose of s 44(i). Without actual knowledge of present or past citizenship there can be no risk of split allegiance. In the context of that actual knowledge, the choice not to take all reasonable steps to renounce that citizenship marks its retention as voluntary.[25]

16. **The limbs of s 44(i):** The contradictors are wrong to submit that acceptance of the Attorney-General's construction would make the second limb co-extensive with the first limb.[26] For example, the first limb captures voluntary acts that fall short of acquiring citizenship, while the second limb (as interpreted in *Sykes*) has the consequence that reasonable steps must be taken to renounce status as a subject or citizen of a foreign power even if that status is obtained automatically by birth (being a consequence not arising from the first limb).

17. If the Attorney-General is correct in his construction of the second limb of s 44(i), Mr Joyce would not be disqualified on the third limb,[27] as that limb must logically be read in the same way as the second limb (ie as referring to a voluntary status).[28]

18. **Reasonable time:** Senator Roberts is wrong in contending (at [16(c)]) that a "reasonable time" commenced before the date of his nomination and extended during the period that he was sitting. On the facts, he was aware of the serious prospect that he remained a United Kingdom citizen well before nomination. Unless *Sykes* is overturned, he was therefore required to take all reasonable steps to renounce that citizenship *prior to* his nomination. There is therefore no substance in the suggestion that, if Senator Roberts is disqualified, there is a casual vacancy.

Dated: 6 October 2017

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25 See, in the context of voluntary assumption of risk in tort, *Insurance Commissioner v Joyce* (1948) 77 CLR 39 at 57 (Dixon J); *Roggenkamp v Bennett* (1950) 80 CLR 292 at 300 (McTiernan and Williams JJ).

26 Cf Ludlam/Waters Submissions at [18(d)]; Amicus Submissions at [25].

27 Cf Windsor Submissions at [30].

28 Indeed, as the Amicus point out (at [9], [26]), it is arguable that properly construed the second and third limbs are in fact one limb but nothing turns on this.